

The relation between criminal police (judicial police) and public prosecution in the Federal Republic of Germany and Austria.

Comparison with French, Swiss, Italian, and old or new Japanese Institutions

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(Received 31th October, 1974)

Vorwort

Diese Abhandlung ist eine zusammengefasste Aufsatz, mit der ich mich während des Aufenthalt in BRD, Paris, der Schweiz, Rom und Österreich beschäftigte.

Um die Verhältnisse zwischen dem Staatsanwalt und der Justizpolizei zu durchforschen, besuchte ich, in Auftrag von der Regierung Japans (d.h. dem Kultusminister), die juristische Fakultät der Universität Heidelberg und die Rechts-und Staatsw. Fakultät der Universität Innsbruck.

Es interessierte mich sehr, wer ein Herr im Ermittlungsverfahren ist. Es freute mich also, dass der Herr im Ermittlungsverfahren vor allem ein Staatsanwalt war. Und ausserdem hatte ich den grossen Eindruck, dass in der Privatklage der Verletzte (Privat-amateur) selbst auf der Stellung des Staatsanwalts seine gegebene Pflicht macht. Weiterer Eindruck, dass sich ein Amateur-richter nicht nur in BRD, sondern auch in der Schweiz befindet, und dass er mit dem Geschworenengericht, ganz anders als das Schwurgerichtswesen der USA, zu tun hat.

Dazu hatte ich die starke Anteilnahme dafür, dass die Voruntersuchung in BRD ausgeschlossen werden soll von der vorläufigen Entwurfreform des Strafverfahrensrechts (25. Juni 1971), da die Verminderung der Rechtsfälle, die wirklich von der Voruntersuchung untersucht werden müssen, immer merkwürdiger geworden war. Die Voruntersuchung aber hält noch ihre Geltung in Österreich, um das Recht des Beschuldigten als Mensch ungeachtet grosser Kosten zu verteidigen.

Es war mir nützlich, das folgende zu gewusst haben; In Österreich verhört der Staats-

anwalt seinen Beschuldigten in der Ermittlung nicht, obwohl er in der Hauptstellung bei der Ermittlung steht, denn man bewahrt damit das Parteien-prinzip. Der Staatsanwalt lässt aber dafür die Polizei seinen Beschuldigten verhören.

Nun, ich danke für ihre herzliche Freundlichkeit Prof.Dr.K.Doehring, Prof.Dr.Peter H. Schlechtriem, und seine Frau, Prof.Dr.R.Serick, und seine Frau, Dr.Römer, Herr Albrecht Bayer in Heidelberg Univ. und Prof.Dr.Hans Walder, Prof.Dr.Hans Schultz in Schweiz Bern Univ. Sekretärin der Botschaft der Schweiz Claudine Buttet, Prof.Dr.P.Leisching, Prof.Dr.F.Nowakowski, Dr.Frank Hoepfel, Dr.Tilmen Tejchner, Frau Franziska Schak, Herr Lvitpold Laesser in Universität Innsbruck Institute der Rechts-und Staatswissenschaftlichen Fakultät, Erster Sekretär der Botschaft Österreichs Winfried Lang. Sie haben alle mich immer gleitet und mir bis in alle Einzelheiten geraten. Ich werde mein ganzes Leben lang überhaupt nicht vergessen!

Tottori, Japan, im Oktober 1974

Shunsuke Tawa

Avant-Dropus

Voilà à quoi je compléts ses recherches a Paris et Rome quand je visitais officiellement la cour d'appel de Paris, la parquet de la cour d'appel de Paris, la direction de la gendarmerie et de la justice militaire. Direction Central de la Police Judiciaire, Divisionnaire de la Police Nationale et il Carabiniere, Roma, grâce à la bienveillance de la ministère des Affaiers étrangères de la France et de autorités gouvernementales d'Italie mon séjour dans la République fédérale d'Allemagne et Autriche pour faire des recherches sur la relation le procureur et la police judiciaire suivant les ordes du ministre de l'Éducation du Japon.

J'exprime mes remerciement au Secrétaire général Monseigneur Gillet, Vice Secrétaire Monséigneur Burgelin a la cour d'appel de Paris, Docteur en droit, président de chambre à la cour d'appel de Paris, Monseigneur Clair Fardel, Directeur de la gendarmérie et de la justice, militaire, Monseigneur Jean Cochard, Secrétaire général du parquet de la cour d'appel de Paris, Monseigneur Charles Sodini, Direction de la gendarmerie et de la justice militaire (justice militaire), Monsieur le Colonel Pieheféau, Direction Centrale de la police judiciaire, Commissaire Divisionnaire de la Police Nationale, Monsieur Léonce Dupiellet, Conseiller Culturel prés l'Ambassade de France au Japon, Monsieur Alexis Rygaloff, Generale Div. Signóre Arnaldo Ferrara, Député Chef, Colonello, Signóre Boldoni,

Colonnello Dott. Signóre Elio Ravegnani del Carabiniere, Roma, Professeur honoraire du Tokyo Université, Docteur Tadashi Kobayashi.

résumé

1. Qui est-ce qui est le sujet du investigations criminelles?
2. Le corps principla d'investigations criminelles dans la France et République fédérale d'Allemagne sont le procureur du Magistrat.
3. Il Carabiniere appartient à l'armée. Il prend responsabilité de le service de la police affaires militaires et civil. Puis, au champ de bataille, ils agirons comme des troupes de combat. Mais, grand il procède à des recherches du crime, il est sous le commandement d'procureur du magistrat. Il Carabiniere sont tout à fait identique à la Japon antérieur. Donc, la gendarme et il Carabiniere très convenablement maintiennent la paix et l'ordre public.
4. Le procureur du magistrat du France a le droit de commandement d'enquête criminelle sur le service de la police. Je m'intéresse du systemè judiciaire de la France où il y a l'instruction de procès. Le judge d'instruction reçoit ce droit en instruction judiciaire. Les officiers des police judiciaire audessus de commissaire de police (les officier et sous-officiers des gendarme compris) sont la mandataire de enquête judiciaire par le judge d'instruction.
5. Le procureur du magistrat et ministre de l'intérieur ont un droit de commandment sur le gendarme qui appartient aux forces.
6. Á cet égard il n'y a pas de police special comme, règle fondamentale en France, elle est différente de la République fédérale d'Allemagne.
7. Á cet égard le sujet du investigations criminelles sont les procureurs magistrat, comme règle fondamentale dans la France et Allemagne, ils ne sont pas la partie, ils peuvent contrôler la investigations criminel, donc il est clair de leur responsabilité.
8. Les système du procureur du magistrat dans la France et Allemagne, et du gendarme sont tout à fait identique à la Japon antérieur. Alors, je suis plein d'admiration comment le Japon a subi l'influence de France, Allemagne et Italie.

Tottori, Japon, octobre, 1974.

Professeur adjoint a lá Université
de Tottori governmental

Shusuke TAWA

The relation between criminal police (judicial police) and public prosecution in *Deutsches Bundes Republik* (The Federal Republic of Germany) and *Österreich* (Austria).

(Comparison with French, Swiss, Italian, and old or new Japanese Institutions.)

by

Shunsuke Tawa

The main objective of this study is to introduce the relations between the criminal police (judicial police) and public prosecution in *Deutsches Bundes Republik* and *Österreich*. Thereafter, necessary future changes in the Japanese Judicial system will be discussed.

I. The charcter of BRD's judicial police.

- (1) BRD's judicial police are not called "judicial police", but called "criminal police".
- (2) BRD's Police is oomposed of criminal police (*Kriminalpolizei*), security police (*Schutz Polizei*), the National Police Reserve (*Bereitschaftspolizei*), water police (*Wasserschutzpolizei*).
- (3) All these Police have executive power (*Zwangsbefugniss, Rechtsverordnung*).

II. The system and the operation of the police.

Criminal police submit to the direction of public prosecutors to investigate crimes. In this sense criminal police are judicial police and are given the executive power to perform this duty. Therefore they are subordinate to the prosecutive attorney only within this realm.

The position of the judicial police however is coordinated with the position of the public prosecutor. Judicial police serve as an assitant organ (*Hilfsbeamte*) to the public prosecutors in investigations of criminals or proofs.

There are various security police divisions which include railway police (*Bahn Polizei*), custom house police (*Fahndung*), taxation police (*Zollaufseher*), coast guard (*Marien-sicherheitsamt*), water police (*Wasser Polizei*), etc¹⁾. There are total of 13 divisions.

1) Volkmar Götz: *Allgemeines Polizei und Ordnungsrecht, zweite Auflage*, Vandenhoeck & Ruprecht, S.111.

Each division is headed by a minister.

When an accident occurs and is connected with a crime, should the public prosecutor determine, through investigation, that a crime has taken place, he then has the duty to collect facts proving guilt²⁾. The public prosecutor is the dominator (Herr³⁾) in the criminal proceedings. The division involved must submit the case to the direction of the public prosecutors. The judicial police belongs to the Bureau of Police (*Allgemeine Polizeiaufsichtsbehörde*) which is under the direct control of the Minister of the Interior. This organ is not a part of the judiciary department, however, the judge and the public prosecuting attorney have the special directing power over the police. The police must report their treatment of the criminal investigation (*Verhandlung*) to the public prosecuting attorney without delay. When it is indispensable not to delay, the case documents may be sent directly to the magistrate of peace by police.⁴⁾ However, the investigation of crimes by the public prosecuting attorney is limited to the circumstances in which the execution and the application of the criminal proceeding law has a difficult and complicated problem.

At this point, it is necessary to explain two other interesting characteristics of the judicial institutions. One is the *Voruntersuchung*, and the other is the *Privat Klage* (including *Klageerzwingungs-verfahren*). *Voruntersuchung* is quite a different institution from the preliminary hearing in the U.S.A. (Anglo American Law).

III. *Voruntersuchung* in BRD.

While scrutinizing the prosecuting documents, the enforcement of *Voruntersuchung* should be done by the proposal of the defendant, or the public prosecuting attorney, if it should be admissible because of its difficult character or importance. It could be done within the administration of the federal court, or of the state supreme court, or of the jury court (*Schwiergericht*) in the first term.⁵⁾

But, in a case belonged exclusively to the jury court, the "*Voruntersuchung*" should not be done when it is the mono *Tatbestand* and the *StA* (prosecuting attorney) concludes it to be unnecessary. In "*Voruntersuchung*", *StA* asks the *Untersuchungsrichter* (preliminary judge) to cooperate with him. *Voruntersuchungsrichter* is *Untersuchungs-richter*. *Untersuchungsrichter* is the director of the "*Voruntersuchung*". *Untersuchungs-*

2) Jürgen Baumann: *Aufgaben der Polizei*, Verlag W. Kohlhammer, Stuttgart Berlin Köln Mainz, 1972, S. 74.

3) a. a. O., StPO, Art. 160

4) StPO, Art. 163, ibid. Jürgen Baumann: *Aufgaben der Polizei*, S. 79.

5) StPO, Art. 178

richter becomes the conductor of the criminal investigation place of *StA*, and manages each investigating operation quite independently.⁶⁾

When *Untersuchungsrichter* inherits the *Voruntersuchung* from *StA*, *StA* loses his directing power over the police about criminal investigation.

Concerning this connection and relation between *StA* and police, there is not a little difference from *Österreich*, or France. In *Österreich*, in every case, which should be tried at the jury, *Voruntersuchung* should be preceded. And *Voruntersuchung* is usually tried by the request of *StA*⁷⁾. When *Voruntersuchung* commences, *Untersuchungsrichter* takes action under the direction of *StA*⁸⁾.

There are two kinds of *Voruntersuchungsrichter* here. The one is the case of a large city, and the other of a small city. In the former, *Untersuchungsrichter* takes charge of the duty. And in the latter case, *Bezirk Richter* has charge of the duty. *Untersuchungsrichter* sometimes asks police to investigate, while *Bezirkrichter* sometimes requests *Gendarmerie* (Austrian District Police).

In the criminal investigation, the director is always *StA*, and the police is subordinate to *StA*. And at *Voruntersuchung*, *Untersuchungsrichter*, or police co-operates with *StA*. In this case the main constituent is intrinsically *StA*, while *Untersuchungsrichter*, or police co-operates with him only. In this term, police is not allowed to make conclusion on the investigation.

It should always be *StA* that finishes the criminal investigation.⁹⁾

In France, *l'information* (*Voruntersuchung*) is seldom tried. And it is performed only by the request of *magistrats du parquet* (*StA*, public prosecuting attorney). The only case in which *l'information* is required should be a difficult or serious crime.¹⁰⁾ When *l'information* begins, *magistrat du parquet* retires. And in this proceeding, *judge d'instruction* (*Voruntersuchungsrichter*) dominates. During these proceedings, it is the principle that the *judge d'instruction* should investigate for himself. But when he thinks it necessary, he can entrust the judicial police officer with the investigation.¹¹⁾

6) *ibid.* Baumann, S. 179.

7) Kern-Roxin: *Strafverfahrensrecht*, 11. Aufl. C.H. Beck, München 1972, 374 S., *Viel geehrter Univ. Assistent Dr. Frank Hoepfel, Livitpold Laesser* (Univ. Prof. Dr. Nowakowski *Institut für Kriminalwissenschaften des Rechts- und Staatswissenschaftlichen Fakultät, Universität Innsbruck*)

8) Klaus Mansse: *Die Gerichtliche Voruntersuchung in Frankreich, Österreich, Italien und der Schweiz*, Potsdam, 1966, S. 51.

9) *a. a. O.*

10) cf. à M. Louis HUGUENEY: *PROBLÈMES CONTEMPORAINS DE PROCÉDURE PÉNALE*, PARIS, SIREY, 1964, pp. 135–136.

11) cf. *ibid.* M. Louis HUGUENEY pp. 138–144.

In BRD, for practical investigation, *Untersuchungsrichter* appoints the *Ermittelungsrichter*. It is incumbent upon *Ermittelungsrichter* to make investigation at his responsibility in the capacity of *StA*. *Ermittelungsrichter* works in the investigating process with *StA*.

Considering these rules and the practice, collectively 2.3. I can conclude as follows:

- (1) The chief of criminal investigation is *StA*.¹²⁾
- (2) Police, special police, *Ermittelungsrichter*, *Untersuchungsrichter* are the assistants to *StA* in prosecuting a criminal suspect, but they are not the assistants to *StA* in discovering crimes.
- (3) Of course, they are the assistants to *StA* discovering and prosecuting crimes.
- (4) The police is an assisting organ in criminal process and a criminal clearing organ which is devoid of the public prosecuting right.¹³⁾
- (5) Therefore police investigation should be done through the filter of *StA*.¹³⁾
- (6) Then, in BRD, *StA* is the *Herr* (dominator) in criminal investigation in principle.¹⁴⁾
- (7) Of course, in practice both police and *StA* have investigating power. When a criminal case is at hand, police begin to investigate first, collect proofs thereof, and catch the criminals as fast as they can.¹⁵⁾
- (8) The *StA*'s investigation power should be authorized on the conditions in which the regulation by *StA* should be better and significant for securing the situation, weighing or estimating the crime¹⁶⁾.

About the future of "*Voruntersuchung*", BRD presented "A temporary bill for the reformation of criminal proceeding law" ("*vorläufiger Entwurf Reform des Strafverfahrensrechts*") on 25, 6, 1971.

The plan of the bill offered that the institution "*Voruntersuchung*" should be abolished, because the number of cases which the "*Voruntersuchungssystem*" has tried have been extremely decreasing recently. Statistics¹⁷⁾ indicate 0,00550 in *Amtsgericht* (court of peace), 2,0027 in *Landgericht* (district court), 14,6597 in *Oberlandesgericht* (appellant court) in 1969.

12) *ibid.* Baumann S.80. ff. vgl. *ibid.* Roxin S.48.

13) *ibid.* Baumann S.79. vgl. *ibid.* Roxin S.46.

14) *ibid.* StPO. Art. 160 (1)

15) *ibid.* StPO. Art. 163 vgl. *ibid.* Baumann S.79.

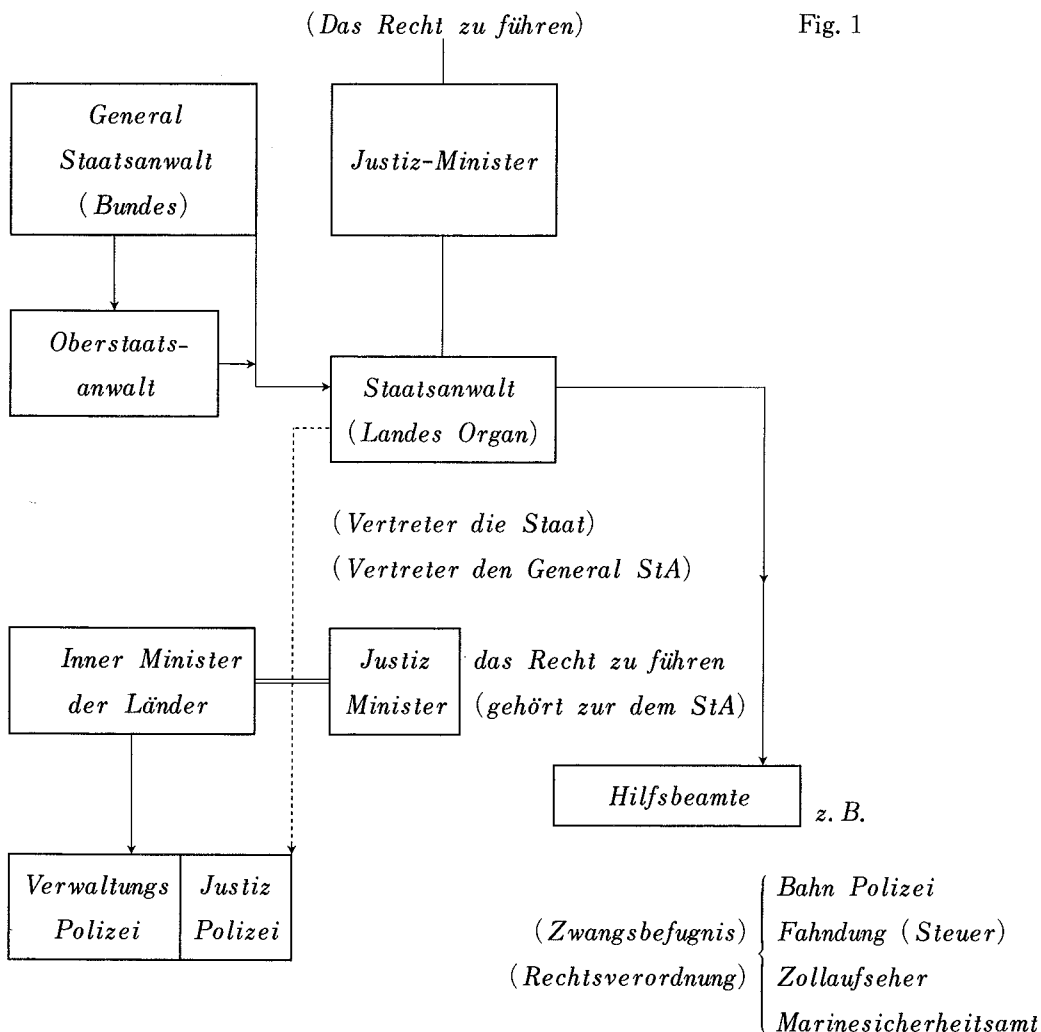
16) Baumann S.74.

17) Bundesministerium der Justiz, 25, 6, 1971 "*Vorläufige Entwurf des Strafverfahrensrechts*" viel geehrter Dr. Römer (*Kriminalish-prozessische Seminalität, Juristische Fakultät, Universität Heidelberg*)

Shortly, an average of annual statistics indicate under 5 %.¹⁸⁾ Frankly speaking my opinion, “*Voruntersuchung System*” is a good institution to protect the defendant’s rights, because the double filter can be prepared (*StA* and *Voruntersuchungsrichter*).

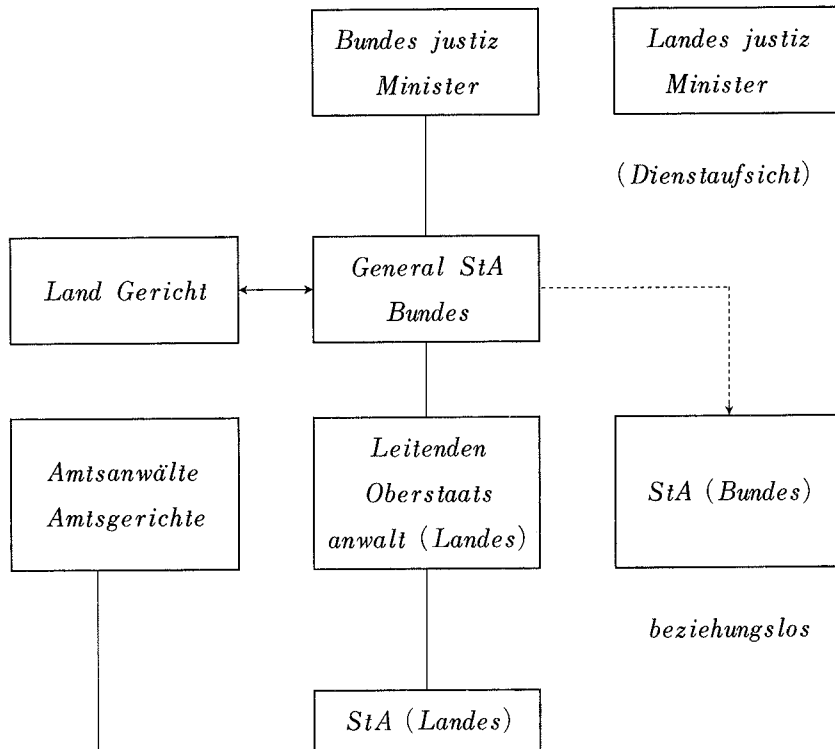
Of course it is evident that the Japanese old *Voruntersuchung System* could not serve this idea. On the contrary, it is rather interfered with the submission of antiproof by the defendant. But, in *BRD*, because *Voruntersuchung* is not a constitutional institution, and in addition it takes much time and costs also, compared with small percentage as above mentioned, the abolition should be indispensable.

IV. The system of *StA* and the relation with police.



18) *ibid.* S.101.

Fig. 2



→ *Amtsanwalt* is only to do with the cases which are managed in *Amtsgericht*.

Briefly speaking, he is identical with our assistant public prosecutor.

Brief conclusion

- (1) There are *General Staatsanwalt* and *Landes Staatsanwalt*.
- (2) There are *Landes justiz Minister* and *Bundes justiz Minister*.
- (3) The difference between *Bundes StA* and *Landes StA* is only the territorial jurisdiction.
- (4) The relation between *StA* and Police is characteristic in the field of judiciary. *StA* does not belong to the 3rd organ, but to the executive authorities. But, systematically, it belongs to the Minister of Justice. And functionally, he is the deputy and the counsellor (attorney) and has a role between the execution (enforcement) and

the observation of the law. He is the monopolizing bureaucrat who serves at the court but is quite independent of it.¹⁹⁾

The relation with police draws much interest. *StA* of *BRD* has the direction right over the police officer by Art. 160, 161, 163 *StPO*. In France, it is the same. In Austria, it cooperates with *Voruntersuchungsrichter*. In Switzerland, there are differences among cantons^{19')}. In Japan after World War II, the police is given the right of the first investigation, independent of *StA*. But, *StA* can investigate a crime for himself when he finds it necessary to do so. And in this case, he can make the police officer, or police man (including special police) assist him to investigate. In Japan, the police staff who occupy an upper rank over the police sergeant is appointed as the judicial police officer. And, further more it is those in the ranks above the police inspector who are admitted to request the judge to issue the warrant of arrest. Common policemen, or constables are not given the right to receive complaints, or denunciation: As for the classification by rank only, the present Japanese System is similar to the French, or German System, because the French Judicial police inspector (including officer de gendarme, sous officer de gend' arme) has the power by which he can arrest a suspect temporarily or let the *judge d'instruction* entrust him with the investigation. And, "*agent de police*" (common police man), *gendarme soldat* (gendarme soldier) has the duty to help the police superintendent, *officer de gendarme*, and the police inspector, *sous-officer de gendarme*. In *BRD* also, what rank of the police officer should serve as the assistant to *StA* is regulated by Art. 152 (2) *GVG*.

In Italy, there has been "*carabinière*", which belongs to one part of the army. They serve as the assistant to *StA* (*procuratôre*) in the status of *polizia giudiziaria* (judicial police), while they have the duty as the securiting police. This type has originated, the same way as in Belgium, from the *gendarme française*. And the character being extremely similar to the Japanese gendarme system, and at that time Japan having the civil judicial police with *gendarme*, it seems to me that Japan was under the influence of French System till the end of World War II. since 1881. And, then scrutinizing Art. 160 *StPO*, Art. 143, 152 *GVG*, Art. 304, 353, 427, 536, 14, *al. 1^{er} C.P.P.*, it will be seen how much the Japanese *StA* and Judicial systems have been influenced by the German and French System.

19) *ibid.* Baumann: *Aufgaben der Polizei*, S.73.

19') *Viel geehrter Univ. Prof. Dr. Hans Walder (Kriminalish-prozessische Seminalität, Jusitische Fakultät, Universität Bern)*

Since World War II, the relation between Japanese Public Prosecution and her judicial police system has been strongly influenced by American laws. Though the Japanese Government had to accept the whole-scale transformation in which the power of criminal investigation was turned over to the hands of judicial police, limiting the duty of prosecutors to prosecution, they still are able to have a contact with police investigation only when regarded as necessary, as stipulated in Art. 191, 193 Japanese Criminal Proceeding Law.

Reviewing this last point, *BRD's* good inheritance has happily survived a little even after the surrender. Especially, as seen from Art. 161, 163(2), 163a(3), 162(1), 160 *StPO*, the good character of the dominator leading and controlling criminal investigation as the lawyer has been well retained in the duty of *StA*.

And, it has been considerably inherited by Japan who has been well instructed by Germany, I think. But, while *BRD's StA* is not the party, as stipulated in Art. 160(2), 296(2), 365 *StPO*, the Japanese *StA* has the character as the party a little, because the Japanese Criminal Proceeding System has adopted the *Klagegrund System*, and *Parteien-Prinzip* (Art. 256, 312 Japanese Criminal Proceeding Law, Art. 37(1), (2) Japanese Constitution). The Japanese *StA*, nevertheless has a character similar to *BRD StA* in that he has the power to investigate in criminal offense, to institute public action, and to control the execution of trial decision, and has the duty to transact the business attributed by law as the representative of public good, Art. 4, 6 Japanese Public Prosecuting Office Law, *vgl.* Art. 160, 161, 296(2), 365 *BRD StPO*.

As stated above, the police officer who is directed by *StA* should be appointed as assistant of *StA* by 152 *GVG*. But, police also has its investigating right, Art 163 *StPO*. And the practical investigating action has been rather transmitted to police as time went on, Art. 161 *StPO*.²⁰⁾

Today, *StA* has the judicial controlling right concerning both the direction and the investigation in most cases. And in such cases, police can also investigate by themselves, independently. *StA* is not to carry out his duty according to Art. 170 *StPO* only. Only in the cases in which special rights are anticipated, and practical and personal means are demanded, *StA* investigates for himself.

There are various judgements as to the abridgment of *StA's* controlling right. Psychological judgement, technical judgement (the development of natural science adopted in

20) *ibid.* Baumann S 73.

the criminal investigation business) and the financial judgement work together. Some people may complain about the development. But, it has also one merit. Above all, if the question should be passed through without check, the objectivity of *StA* will be too huge.

And on the contrary, there is the voice in which the police should be included into *StA*. And such is the voice which justifies the discrimination between the judicial and *StA* making permanent.²¹⁾ The enclosing of *StA* into the police would make the moving to the party suit compulsory. If they hesitate at this step, never let *StA* drive away to the police role. Enclosing the police into *StA* brings another element into the judicial.

The purity of the judicial should be kept. *StA* in the intermediate position has a favorable status (while it has the independent position, it has the directing right). The activity of *StA* secures a larger objectivity and independency.²¹⁾

Police including the criminal police, is placed under the police bureau whose top is the internal minister. And he is never a part of the judiciary. But, both the judge and *StA* have the directing right. The *StA*'s directing right is held, and applied to cases of investigation. And *StA* has the direction right to each police office and its officers, in each case. The police officers who have the duty to keep the land in peace are submitted by *StA* as its assistants by law. But, the investigation in emergency, by *StA* and its assistant cannot be substituted by all the police officers.

Notwithstanding, the criminal proceeding duty is incumbent upon all the police officers, *zB.* all the police officers in *BRD* have the power of arresting the suspect temporarily (*vorläufig Festnahme*).²²⁾

And, looking from the contrary vision, these police member including special police (*z. B. Bahn Polizei*)²³⁾ should be assistant, or subordinate to *StA*. Thus reviewing superficially, there is similarity between *vorläufig Festnahme* and the arrest in emergency in Japan (after World War II), there is, however great difference between *BRD* and that of Japan, essentially. As above mentioned, before World War II in Japan, the master executive of criminal proceedings (including criminal investigation) had been *StA*.²⁴⁾

21) *ibid.* Baumann S.73.

22) Volkmer Götz: *Allgemeines Polizei und Ordnungsrecht, Zweite Auflage, Vandenhoeck & Ruprecht* S.111.
Drews, Wacke: *Allgemeines Polizeirecht, -ORDNUNGSRECHT-Der Länder und des Bundes*, CARL HEYMANNS
VERLAG KG BERLIN. KÖLN. MÜNCHEN. BONN, 1961, S.113.

23) *ibid.* Drews, Wacke: *Allgemeines Polizeirecht* S.551.

24) Old Japanese Criminal Proceeding Law Art. 246, 248, 249.

The criminal police (judicial police including *gendarme*, the other various special police) had been only assistant or subordinate to *StA*. After World War II, the duty and power in the field of practical criminal investigation was rather transferred to criminal police.²⁵⁾ Therefore, both police and *StA* have investigation power. The power of arrest in emergency only means that the crime is serious, suspectful, and unable to wait for the writ to be issued.²⁶⁾

In France also, there are similar institutions for *BRD*. It is called "*La recherche des preuves*." It is stipulated in (art. 527 *C. proc. pén.*). It has the great meaning to secure the first step of criminal investigation. And it is much interest in that these institutions have been connected with *le procureur de la République* (*StA*), and *le juge d'instruction* (art. 59, al. 3, *C.P.P.* 56 a, 60, 74, 68, 72, al. 5, 63, 65 *C.P.P.*).

Namely, in France also, the master should be *le Procureur* in criminal investigation however, he can ask *le juge d'instruction* (*Voruntersuchungsrichter*) to try *Voruntersuchung* (*L'ACTE D'INSTRUCTION*). And then *le juge d'instruction* can commit *le officier de police judiciaire* (art. 72, al. 5, *C.P.P.*) to investigate the criminal.²⁷⁾

In brief, the master of the criminal investigation has been still *StA*, and criminal police, or judicial police has occupied assistant or subordinate position to *StA* both in *BRD* and in France. But, the character of *BRD StA* is the filter of the investigation of police, whereas *le Procureur de la République* (France) is the controller of investigation, I think. And *BRD's* criminal police usually acts in practical investigation except in difficult or severe cases, whereas *le officier de police judiciaire* has the characteristic that he can be committed to investigate by *le juge d'instruction*. That *BRD* and French judicial (criminal) police above certain ranks have held the power of arresting temporarily is of much interest compared with the Japanese, because Japan has not his institution, as above mentioned.

Nowadays in *BRD*, there are special polices different from the ordinary police who (both) are located as assistants to *StA*. These special police are following-*Bundesgrenzschutz*²⁸⁾ (federal border patrol), *Bundesbahnpolizei*, *Fahndungsdienst* (*DB*) (Railway police of *Deutsches Bahn*) and *Beamte der Finanz, -Zoll und Postverwaltung*. (*Polizeihauptwachmeister, -Oberwachmeister, Revieroberwachmeister, Kriminalhauptwach-*

25) New Japanese Criminal Proceeding Law Art. 189(2), Police Law Art. 2(1)

26) New Japanese Criminal Proceeding Law Art. 210.

27) *ibid.* M. Louis HUGUENEY p. 150, pp. 157-158.

28) Hans J. Wolf: *Verwaltungsrecht II 3. Auflage Juristische Kurz-Lehrbücher*, Verlag C.H.Beck München 1970, S.432. ff.

28) *ibid.* Drews, Wacke: *Allgemeines Polizeirecht*, s.541, S. 550. f. f.

meister, etc.) Zollfahndungs, Zollgrenzdienst, Jagdaufseher.²⁹⁾

As I have explained, police has then two duties. One is preventive operation and the other is criminal investigation.

Concerning the position of the police, one of the criticisms is following.

In the criminal prosecuting process, police operates as the assistant to *StA*. In criminal investigation, police has to play the main clearing role, and is controlled and at the same time directed by *StA*.³⁰⁾ As a rule, police is still more responsible for investigation.

Police needs not beforehand report to *StA*. On the contrary, police rather has the primary arresting right. The police of course can arrest the suspect to investigate whether he is criminal or not. But, the police authorities concerned are a pure administrative organ. It belongs to the executive even when it operates in the organ of criminal investigation. Through the strong judicial *StA*, the executive can and should be checked everywhere, and its incomplete quasi-judiciary operation and the knowledge of law become complete. Quite likely the operation of the police in the criminal proceeding is led by the process subject (*StA*) and is exclusively to the proceeding law. The police is the criminal proceeding assisting organ and the clearing organ without prosecuting right. Therefore all police investigation must be practised through the filter of *StA*.³¹⁾

In Japan, before 1948, this relation had been as follow. If the *StA* suspects that there may be some crime, he should investigate both criminals and the proof. Since 1948, this relation has been modified. If the police feels there may be some crime, he should investigate both criminals and the proof. If *StA* thinks it necessary, he can investigate the criminals for himself. *StA* can make police officers (including various special police officers-railway police, post inspector, forest rainger, labour working controller, coast-guard, immigration, narcotic police, jailer, and palace guard) his auxiliary organ in the criminal investigation.

Considering these institutions, the relation between the judicial police and *StA* in *BRD* is very similar in its form to the previous system of Japan, I think.

V. The private prosecution in *BRD* (as the organ of criminal prosecution).

The other *BRD* System in which I have interest is the private prosecution (Quasi prosecuting process) d. h. *Privat-Klage*. (*StPO* Art. 374(2)), and *Klageerzwingungs-*

29) *ibid.* Drews. Wacke: *Allgemeines Polizeirecht*, S. 523, 527, 552, 557, f.f.

30) *ibid.* Jürgen Baumann: *Aufgaben der Polizei*, 1972, S. 79.

31) *ibid.* Baumann: *Aufgaben der Polizei*, 1972, S. 80.

verfahren (StPO Art.172). As we know, U.S.A. has the indictment system (grand jury) in which common citizens take part. And in Britain, the private prosecution has been presented whereas the grand jury had been abolished. In U.S.A., on the contrary, the private prosecution was transmitted to the prosecuting attorney, whereas the grand jury has been kept still now in the Federal Constitution. Of course, the number of states having the grand jury has been decreasing, and in some states it has been abolished and converted to the public prosecutor's information.

As you know, in Japan before World War II, the public prosecuting attorney had been responsible both for criminal investigation, and public prosecution, and his right and duty had been exclusive. After World War II, the primary investigating duty was transmitted to police. But the association into the criminal process by the citizens was never adopted except the committee of prosecution census. The reason for this was as follows. If an amateur is engaged in criminal investigation, or take part in the public prosecution, it may rather disturb or interfere the summit between the investigation and the public prosecution.

And both to avoid the prosecuting attorney's autocratisizing and to protect the civil right from not prosecuting, especially in the field of police, prosecuting officer's committing citizen's fundamental right, the quasi-prosecuting process has been exceptionally adopted since 1948.

Contrasting with Japanese Institutions, BRD's one has considerable suggestions for us, I think.

BRD's private prosecution (*Privat Klage*) has the following characteristics.

- (1) In the private prosecution, the private prosecutor himself becomes the public prosecutor. According to StPO Art. 374(2), not only the wounded but also the other citizen (if the private prosecuting does not proceed) may be the prosecutor. About this, it is very different from ours, because in Japan it must be exercised by the attorney (Lawyer) appointed by the court. The BRD private prosecutor can raise the public prosecution like StA by StPO Art. 381, but in the case of *Klagerezwangsverfahren* (StPO Art. 172(3)), he must get the signature from the lawyer). And, he must pay the previous fee and guarantee money to be considerable³²⁾.
- (2) The hearing right exclusively belongs to StA. And the reviewing right of the hearing documents may be only exercised through StA.

32) *ibid.* Baumann S.82.

- (3) The private prosecutor can not quite use the assistant organ of *StA*, and he has not any kind of executing right. He is not also admitted to call for any one or to send the writ. But about legal means, he stands in same position as *StA*. It is disputable whether the private prosecutor may have the legal means.
- (4) The private prosecution is valid in the case of accident (*Delikte*) in which private prosecuting is capable. But if the wounded (*Verletzte*) does not use this right, police (without information, or condemnation) can investigate these minor criminals, for example house freedom breach, despite, wounding body, the damage of the letter secret, the retorting of the fact, the illegal act of earning by the bet, etc.³³⁾

VI. The comparison of *BRD*'s police meaning with foreign one.

The police in the meaning of the institutions exists in 7 *Länder* (states). Observing from its function, it is constructed from the securiting police type (*Schutzpolizei*), criminal police (*Kriminal Polizei*), police reserve (*Bereitschaftspolizei*) water police (*Wasserschutzpolizei*)³⁴⁾

In Baden, Württemberg, Bayern, Rheinland, Pfaltz, Saarland, *Verwaltungs Polizei* (administrative police.) is not included in the organization of police. In this sense, "police" means police executive duty (*Polizeivollzugsdienst*).³⁵⁾

In the above mentioned states, there is executive police. Observing it from the area, or zone, *BRD*'s police is separated national, and self-governed police. Self-governed police has the duty to prevent or suppress the crime and the breach of the order within the entrusted district. Self-governed police is inclined to act, amalgamated after World War II. There has been the idea since long time ago that the police action should be exercised by governmental officer because it is the governmental act.

When an emergency happens, governmental police transacts. Governmental police has the trans zone disposition. Therefore there is the danger that district police (self-governed police) depends upon central police (governmental police).³⁶⁾

Observing from police function, criminal police belongs to the special realm. The phenomenon of rising of the criminal police conception in which it is exclusively engaged to clear, and to seek the criminal act made criminal police separate from common police at the end of the 19th century. Through my essay, I intended to state the relation

33) *ibid.* Kern-Roxin: *Juristische Kurz-Lehrbücher Strafverfahrensrecht* 11. Auflage, S.315.

34) *ibid.* Volkmer Götz: *Allgemeines Polizei-und Ordnungsrecht*, S.111.

35) *ibid.* Volkmar Götz: *Allgemeines Polizei-und Ordnungsrecht* Zweite Auflage, S.111.

36) *ibid.* Volkmar Götz: *Allgemeines Polizei-und Ordnungsrecht* Zweite Auflage, S.112.

between this police function and public prosecutor. But, in the other view-point, the criminal police has the relatively strong connection with the other police, I think.

Namely, there is the conception of (Federal Police) *Die Bundes Polizei* in DBR. This conception includes (railway police) *Bundes Bahn Polizei*, (border patrol) *Bundesgrenzschutz*, (Federal criminal police) *Bundes Kriminal Amt*, (custom officer), *Zollgrenzdienst*, tax inspector (*Zollfahndungsdienst*).³⁷⁾ Like this, the police whose power is confined to each matter is called (special police) *Sonder Polizei*.³⁸⁾ These conception has always been connected with the criminal police. Because various crimes usually happen in various realms, the criminal investigation should be exercised, applied with the classification of the special crime.

But, the essence of the criminal investigation itself should not be interpreted variously per police. For this reason, the StA plays the most important part to control the various criminal investigations, I think.

In *Österreich* also there is the conception of security police. Namely, *Sicherheit Polizei* (security police) z.B. *Wasser Polizei* (water police), *Feuer Polizei* (fire police), *Bau Polizei* (building police). *Sicherheit Polizei* belongs to Federal Government. *Feuer Polizei*, *Bau Polizei* belongs to the *Land* (state). These two are called *gesundes Polizei*. (Federal Police) *Bundes Polizei* are placed in metropolises z.B. *Wiena*, *Innsbruck*, *Salzburg*, *Grats*, *Lintz*, and *Gendarmerie* are put in the other places. Police reserve (*Veranstalt Polizei*) was established in 1920. *Bundes Polizei* has the duty to manage their city's own business z.B. passport control. But, *Bundes Polizei* is not self governing police, but Governmental police. In this point, it is different from that of Germany. "Gendarmerie" are placed in the village. The village means the place except cities. The world "gendarmerie" is very similar to "gen'd arme" in France, but Austrian *Gendarmerie* is civil police, and it does not belong to the military.

Gendarmerie is the *Land* (*Bezirk*) (state) servant. But, *Gendarmerie* also belongs to the Minister of the Interior through the chief of *Bezirk*, and the director of peace (*Sicherheit Director*).³⁹⁾

As I said, in Austria, criminal investigation means the whole process between the arrest and the public prosecution. There are *Voruntersuchung* between them. *Vorunter-*

37) *ibid.* Volkmar Götz: S.119.

38) Art. 87 1 GG, 87 12 GG, 108 1 GG.

39) *Viel geehrter* Dr. Tilmen Teichner (Universität Innsbruck, *Institute der Rechts und Staatswissenschaftlichen Fakultät*)

suchung should be tried by the request of *StA*. In this case also, the subject body is *StA*, and the examining judge (*Untersuchungsrichter, Bezirk Richter*), police only cooperate with him. In this case, police cannot end the investigation, with offering the verdict. It is *StA* only who can end the investigation. But, *StA* cannot directly examine the suspect for himself. It is the police who examines the suspect. (88 III, I *StPO*). *StA* can receive the result of the examination of police (including all the executives). The reason why *StA* cannot investigate practically (97 II *StPO*) is explained by the role of *StA* (as the party). Therefore rather *StA* makes *Untersuchungsrichter, Bezirk Richter*, police investigate (88 1 *StPO*).

The examining judge (authorities concerned) must survey whether the offer of *StA* is legal and the undertaking is within his right. Though the investigation may be entrusted to the examining judge by *StA*, yet it does not mean the commencement of the criminal proceeding.⁴⁰⁾ On the contrary, it rather means that *StA* reserves the position as the leader, dominator for raising the public prosecution. In the case of the police being entrusted, the sphere of the investigation is restricted.

StA, as I mentioned above, has the power to make police examine any one who took an oath (88 III 1 *StPO*). And in an emergency, he is able to make the police inspect the evidence or search the house by the immediate decision (88 III 2 *StPO*).

StA has the right to be present when the investigation (examination) is conducted. And when the evidence written at the place is handed over the examining judge who surveys the form and validity of the writing without delay, it will be available as the evidence. When the matter will not bear any delay, the police as the first seizure organ can carry out pre-prosecution without the proposal of *StA*. And, the examining judge also can act from the original subjecthood of investigation when the case will not bear any delay. (89 1 *StPO*).

Formerly, the criminal judge of the district court had the power to manage the pre-prosecution act generally until the *StA* who received the report undertook. (89 II *StPO*). And in addition to this, when *StA* refuses or gives up the case which the victim himself can be entrusted with, the private individual can raise the public prosecution (the victim himself or the private individual co-operated with the victim). *Privat Klage* (private prosecution) is originated with Queen Maria Theresia in 1768.⁴¹⁾ It is the ex-

40) *ibid.*: Klaus Mansse: *Die Gerichtliche Voruntersuchung in Frankreich, Österreich, Italien und der Schweiz*, 1966, S. 54.

41) *ibid.*: Klaus Mansse, S. 50.

ceptional provisions. But, for these reasons, it is doubtful whether *StA* is the dominator of the investigation, I hear. But, I think that Austrian *StA* is still the subject of criminal investigation. Because, when *StA* concludes there is not any ground that he commences the process in the pre-prosecution progress, he can return the protocol itself to the police; and when the pre-prosecution is managed by the examining judge, *StA* can send it to the judge (who belongs to the district court) with the view that he can not find any ground for which he follows suit more over.

In France, Police belongs to Government exclusively. The top of the police is the Minister for Home Affairs. The Minister for Home Affairs subordinates the director of general police bureau to him. The Director of General Police Bureau is accompanied by Peace Preservation Bureau which subordinates *C.R.S.* (*compagnie république de la sécurité*), Criminal Central Bureau, Public Security Central Bureau, Paris Police Prefectural Governor (*Préfet de police*), each prefectural governor, Frontier Guards Quasi-Bureau.

French Police is divided in uniformed police and those in private clothes. Those in private clothes are the judicial police, and those in uniform are the securiting police. In this point, Japanese Institutions are quite different from it, because each Japanese Police officer has the double character.

The Director of the General Police Bureau is appointed among the prefectural governors who have the longest career. Only Paris Prefecture has 2 prefectural governors, one is Paris Prefectural Governor and the other is the Super-intendent-General of Matropolitan Police (*préfet de police*). All the prefectural governors except Paris have police power. Paris Prefectural Governor has not, because there is a *préfet de police*. This point was quite the same in the institutions of former Japan. The Peace Preservation Bureau is accompanied by each prefectural preservation department, and it is followed with the civil police (police station). Each prefectural governor has the directing right for these organs. Peace Preservation Bureau is composed of uniformed members only, and this bureau is followed with both prefectural peace preservation bureau, and its subordinate city police (police station). And each prefectral governor has the directing power over them. Criminal Central Bureau is accompanied by the district criminal bureau, and it is followed with the criminal branch bureau which is composed of private clothes-men only, and it has the duty of all the criminal investigation. In Paris, the *préfet de police* has 2 assistant Superintendents-General of Metropolitan Police. They

are also the prefectural governors in the rank. One of them has the charge of the police business in which includes urban general police bureau, criminal bureau, public security bureau, technical bureau, economy police bureau, quarter head office, police station, area criminal and administrative police station. Paris Criminal Bureau has the duty to mobilize when an accident happens in Paris and the 4 cities surrounding it.

Economy police has the duty to superintend the black-marketing, and to check the quality of the goods.

And the other assistant superintendent-general of Metropolitan Police has the role of police administration in which general bureau of police affairs, common police bureau, sanitation, peace preservation bureau, traffic transportation commerce bureau, protection bureau, fire proof head office are included. The traffic transportation commerce bureau operates in the same function as the Land Transportation Control Bureau which belongs to Ministry of Transportation in Japan.

And in France, there is not any special police except *maire* (mayor), *ingénieur* (for-estranger), *garde champêtre* (country ranger), *douane* (customhouse). For the criminal investigation to be executed impartially and smoothly, it is very profitable, I think. There is another characteristic in the French judicial system. That is the existence of the *gen'darme*. The *gen'darme* is a part of the military. The head is Minister of the National Defence. (The head had been the Minister of the army before it had been reorganized into the National Defence).⁴²⁾ French police business consists of National Police and *gen'darme*. But, what is most interesting is that the *gen'darme* also has the duty to maintain the public peace of the citizens. In principle, *gen'darme* is in charge of the inhabitants of a community with a population of less than 10,000, and the National Police has the city or town, (including the surrounding small towns and villages according to circumstances) with a population of over 10,000 under his charge. This relation is similar to Austria. But, Austrian's *gendarmarie* is not a part of the military. The French *gen'darme* is directed by the provost marshal. But the position of provost marshal has been converted to the civilian from military officer since the end of World War I.

The reason why it has become such is grounded upon the point that the *gen'darme* also maintain the public peace of the general citizens. Ane provost marshal has always the additional post of the director of the court-martial.

The provost marshal is as a rule singled from the public prosecuting attorneys of

42) In Italy (*il carabinieri*), it belongs to Army still.

the Supreme Public Prosecutor's Office. The judges advocate except the director of the court-martial are all army or naval officers. The Minister for Home Affairs is responsible for the public peace by Government. While he administers National Police through the each prefectural governor appointed by Government, he put *gen'darme* also under his direction to execute the general police business except the military police business. Military Police is called "provost". Then, when the *gen'darme* act as the civil criminal (judicial police) investigating organ, they submit to public prosecutor's direction. But, there is also the opinion that the directing power of public prosecutor over police, or *gen'darme* only means the controlling power.

In France, the pre-examination (*Voruntersuchung*) is exceptional. But, when *StA* thinks it necessary, he can ask the examining judge (*Voruntersuchungsrichter*) (*Ermittlungsrichter*) to try it. As I mentioned, the examining judge must investigate for himself as the rule. But, the examining judge has not any investigating organ in practice. Then the examining judge usually entrusts the investigation to the police officer who is over the rank of police inspector. The police officers who are over the rank of police inspector have the power to be entrusted with the investigation by the examining judge, and to arrest the suspect temporarily. This sense is understood in two ways. One is that judicial police officers over inspector can investigate independently of the examining judge, and the other is that the examining judge is the dominator of the investigation. But, considering, the text of the French Criminal Proceeding Law's Article, the dominator of the criminal investigation is still the public prosecutor, I think.

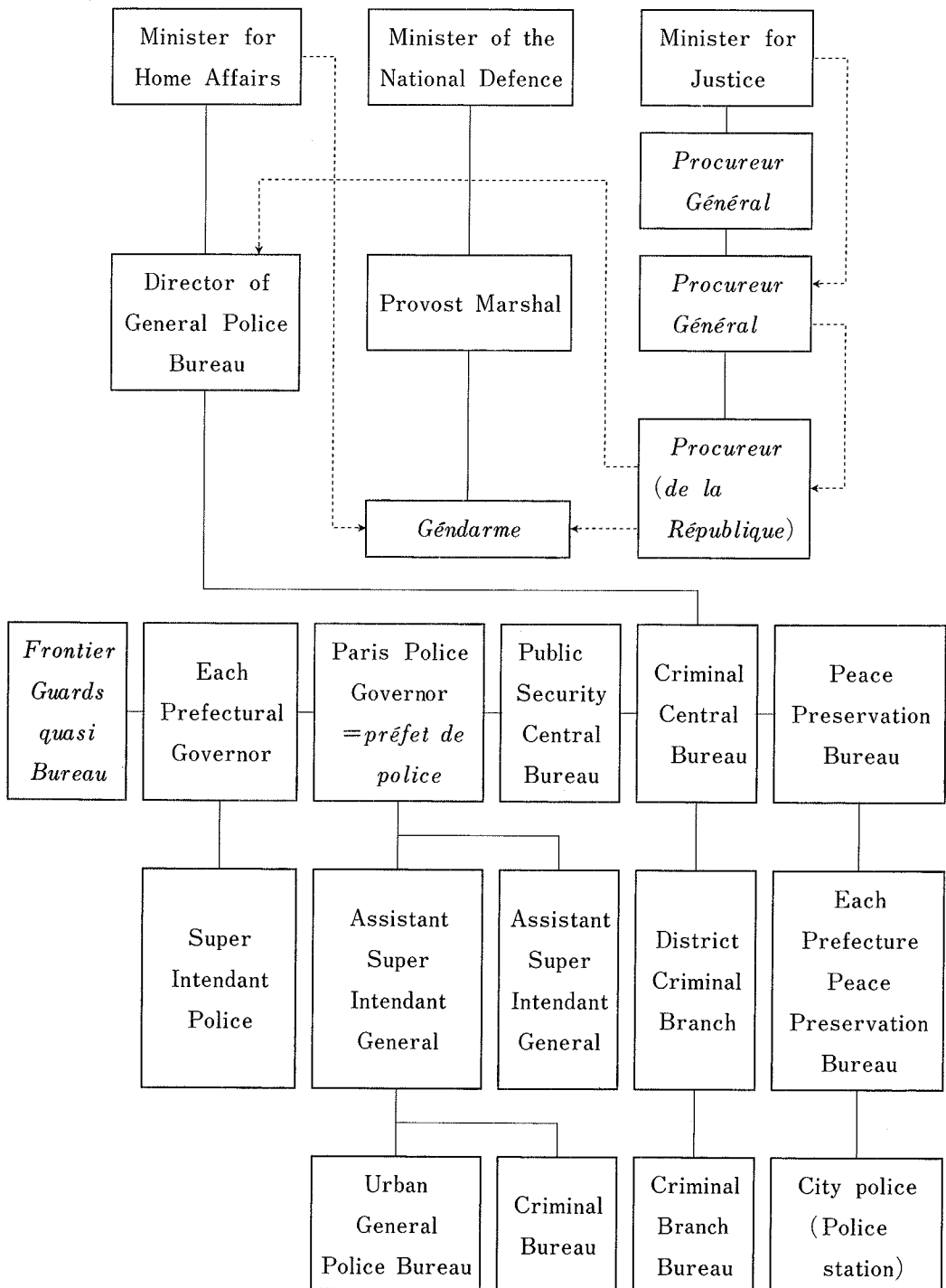
The French Public Prosecutor like *BRD StA* is not the party but the agent of the government who represents the public benefit.

On the contrary, Austrian *StA* and Swiss *StA*⁴³⁾ are the party. As I mentioned, Austrian *StA* can not examine the suspect, but is only able to make the police officer, or examining judge examine him though *StA* is the dominator of the investigation. This means to let *StA* be in the position of the party (Government Plaintiff) thoroughly.

Britain has not the public prosecutor in the sense Japan has. In Britain, the private prosecution is done as the rule. Prosecutors are few. Their role is only to be the agents or the consultants of the law for the government. Briefly speaking, the British Prosecutor is the advocate who belongs directly to Government and Royalty. And in

43) *Viel geehrter Univ. Prof. Dr. Hans Walder Kriminalish-prozessische Seminalität, Juristische Fakultät, Universität Bern*)

Fig. 3



the U.S.A., the grand jury exists still in the Constitution. The indictment of the grand jury makes the prosecuting attorney raise the public prosecution. In some states, the prosecuting attorney can raise the public prosecution by himself grounded by the information. But, in this case also, public prosecutor only raise the prosecution in place of the citizen. Then, the party in the U.S.A. is rather the citizen himself. Public prosecutor is only the agent of the citizen, therefore he is of course the party. Japan had inherited the continental systems for a long time above all the German and French Systems. The public prosecutor's direction style over the police had been extremely similar to Germany and France. The relation between public prosecutor and gen'darme and judicial police was quite the same as in France. After World War II, Japanese Criminal Prosecuting System are considerably influenced by U.S.A. Then the dominator of criminal investigation is the police (in first sense). *StA* is no longer the the dominator of this process, but has the power to filter it still like in West Germany. And to secure the party to a suit, the written indictment by the prosecutor only should be produced as a rule.

Briefly speaking, though the Japanese Public prosecutor is never the party, he must act in the principle of the party to a suit. The relation between *StA* and judicial police shall return to the German or French Style within the limits that the *StA* must be the agent of public benefit and the filter or the controller of the criminal investigation for the police, I think.

